No. 03-933

Supreme Court, U.S.
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In The

Supreme Court of the United States

HON. SILA M. CALDERON, Governor
of the Commonwealth of Puerto Rico, et al.,

Petitioners,

v.

ROBERTO NAVARRO AYALA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARLOS V. GARCÍA GUTIÉRREZ
Counsel of Record
ALEJANDRA BIRD LÓPEZ
CIVIL ACTION AND EDUCATION CORPORATION
Suite 720, Mercantil Plaza Building
2 Ponce De León Avenue
San Juan, PR 00918-1611
Tel. (787) 753-6999
Fax (787) 764-7666

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the First Circuit is obligated to exercise its jurisdiction under the collateral order doctrine or its mandamus review power where a defendant complains that a Special Master's investigation includes "ex parte" (outside the presence of counsel) communications with defendants.

Whether a Special Master designated by a district court may communicate with defendants on an "ex parte" (outside the presence of counsel) basis as part of his investigatory efforts where the district court will not act upon the Special Master's investigation prior to granting the parties an opportunity to be heard and present evidence.

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STATEMENT OF THE CASE

A. Nature of the Case and Procedural Background:

This case originally began in 1974, when Roberto Navarro Ayala, a patient at the Psychiatric Hospital of the Commonwealth of Puerto Rico filed a complaint under 42 U.S.C. §1983 before the United States District Court for the District of Puerto Rico on behalf of himself and all others at the Rio Piedras Psychiatric Hospital (hereinafter the "Hospital"), asserting that the inhumane conditions there violated Plaintiffs' constitutional rights. Included as defendants were the Governor of the Commonwealth of Puerto Rico, the Secretary of Health for the Commonwealth of Puerto Rico, and other government officials having control over the Hospital. The history of the case, which has gone on for over twenty-five years, has involved, among others, court approved stipulations relating to conditions and practices at the Hospital, the appointment of a special master to oversee the implementation of the stipulations (from 1985 to 1997), and various appeals. *Navarro-Ayala v. Hernandez Colon*, 3 F.3d 464 (1st Cir. 1993); *Navarro-Ayala v. Nunez*, 968 F.2d 1421 (1st Cir. 1992); *[Navarro] Ayala v. [Hernandez] Colon*, 956 F.2d 348 (1st Cir. 1992); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325 (1st Cir. 1991). During that time the Hospital instituted reforms designed to improve conditions and eliminate constitutional violations at the Hospital.

By the year 2000, the Hospital had been accredited by the Joint Commission on Accreditation of Healthcare Organizations ("Joint Commission") and had been approved by the Health Care Financing Administration (HCFA), a federal government entity, to become a provider of the Medicare Program. In light of improvements at the Hospital, and with a view towards terminating the litigation

in this case, in August of 2000, the Plaintiffs (Respondents here) and Defendants (Petitioners here)[1] filed a *Joint Stipulation and Order of Dismissal Without Prejudice to Reinstatement on or Before October 15, 2001, on Certain Conditions* (District Court Docket No. 494), which provided for the eventual dismissal of the case. Pursuant to the stipulation, in January 2002, the case was dismissed and closed, subject to the continued effect of certain court orders. (App. at 14-20.) The orders which were to remain in effect required, among others, that monies received by the Hospital from Medicare payments or reimbursements be allocated to the Hospital's operational account (App. at 21-22), and that the Hospital's budget not be reduced (District Court Docket No. 494). No further action was taken by the Court or the parties and the case remained inactive until March of 2003.

B. Events in the District Court Relating to the Order Appealed from in This Case:

On 12 March 2003, the Court entered an order setting a status conference based on information to the effect that the orders left in effect were being violated. (App. at 8-9.) At the status conference Defendants made assurances to the Court and offered to make certain information available regarding the areas of concern. (District Court Docket No. 505.) At the time, the Court expressed its satisfaction with the results of the conference. On 29 April 2003, the Court, acting on new information referred to it by Commonwealth mental health employees, expressed serious

[1] For the sake of clarity, Petitioners are referred to as "Defendants" in the portions of this opposition describing the proceedings below and as Petitioners in the remainder of the opposition.

concern regarding the possibility of non-compliance with Court orders and violations of the constitutional rights of the Plaintiff Class. (App. at 10-13.) According to the information brought to the attention of the district court and later admitted to by the Defendants, in the months preceding the orders now challenged, the Hospital has confronted a financial imbroglio which had already begun to compromise conditions at the Hospital in a manner implicating the constitutional rights of the patients there, the Plaintiff Class.[2] Based on the information received, the district court entered an order reappointing Dr. David Helfeld[3] as Special Master to investigate these matters and report and make recommendations "with all deliberate speed," reinstating, for this purpose, the original order appointing him Special Master in 1985. (App. at 10-14.) The original order of reference provided, among others, that:

> (f) The Master shall have access to all facilities, records, documents and persons affected by or involved in the implementation of this decree for the purpose of gathering information relevant to enforcement of the decree. The Master shall have the authority to conduct inquiries and consult

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[2] The information brought to the district court and admitted to by the Defendants is that requisitions, including those for medications, have been returned for the proffered reason of insufficient funds, patients reside at the hospital beyond the amount of time medically necessary because the hospital is unable to place them elsewhere, the hospital is sorely understaffed with respect to psychiatrists such that one of the Hospital's buildings has been shut down and, as a result, the Hospital had begun to experience periodic overcrowding.

[3] Dr. David Helfeld originally acted as Special Master in this case from 1985 to 1997.

> with professionals to assist in finding facts relevant to implementation.
>
> (g) The Master shall hold meeting as often as he deems necessary, at which any employee, resident, parent, foster parent, next of kin or guardian, or any other person deemed by the Master to have an appropriate interest, may appear and make recommendations, comment, or suggestions as to any matter covered by this decree.
>
> . . .
>
> (i) Informal Suggestions. The Master may make informal suggestions to the defendants, in whatever form he deems appropriate, which in his opinion will facilitate compliance with the decree.

(App. at 24-25.) Pursuant to the district court's 2003 order, the Special Master commenced his investigation holding interviews with Hospital staff and other government health officials and reviewing Hospital documents.

On 5 May 2003, Defendants filed a motion requesting a status conference and objecting to the Special Master's investigation on the basis that it was being conducted ex parte, (meaning outside the presence of counsel) (App. at 125-128.) The concern voiced in that motion was that counsel for Defendants was not being kept abreast of the Special Master's investigatory efforts and was not being allowed to participate in interviews and the furnishing of documents. The Court set a status conference, which was held on 17 June 2003. In the meantime, on 22 May 2003, Defendants filed a "Notice of Appeal from the 29 April 2003 order designating a Special Master," (App. at 144-145), and requested that the order be stayed pending appeal, (District Court Docket No. 511). In addition, on 3

June 2003, the Special Master filed his "Report of Investigation In re Roberto Navarro Ayala, et al. v. Governor of Puerto Rico et al. Civil No. 74-1301 (HL)." (App. at 46-87.)[4] In that report, the Special Master preliminarily concludes that it appears that the Hospital is confronting serious difficulties in offering adequate services to its patients due to a lack of access to its budget. Moreover, the Special Master indicated that he had been unable to complete his investigation because, commencing on 21 May 2003, counsel for Defendants had instructed the Defendants and their agents and employees not to cooperate with the Special Master's investigation, thus obstructing his efforts to gather pertinent information.

On 13 June 2003, the district court entered an order indicating that, contrary to Defendants' position, a Special Master can make ex parte investigations and findings, as long as the parties are afforded an opportunity to challenge them. (App. at 31-32.) After the 17 June 2002 status conference, requested by Defendants, the district court entered an order denying Defendants' petition to stay the Special Master's investigation pending appeal, and stating that it "expects the defendants' full cooperation with the Special Master's investigation." (App. at 33-37.) The Court further indicated that the Special Master's term would expire on 31 December 2003, unless the same was extended by the Court. (*Id.*) The following day, counsel for

[4] Defendants included in their appendix a copy of this report but omitted over eighty pages of exhibits including a mass petition signed by 186 employees bemoaning the deterioration of the Hospital in the past two years.

Defendants filed an "Amended Notice of Appeal to the First Circuit," to include this order. (App. at 152-153.)

On 23 June 2003, the district court issued its Minutes of the 17 June 2003 status conference summarizing what had transpired during that meeting. (District Court Docket No. 523.) On 23 June 2002, counsel for Defendants filed a bewildering motion requesting transcripts of the status conferences of 18 March 2003 and 17 March 2003. (App. at 154-157.) Neither of these status conferences had been held in the courtroom, nor was any court reporter present; nor did Defendants ever request that the status conferences be held on the record and transcribed. The Plaintiff Class and the Special Master responded to this motion. (District Court Docket Nos. 527 and 529.)[5] On 25 June 2003, counsel for Defendants filed a "Second Amended Notice of Appeal to the First Circuit," to include the Minutes of the Status Conference insofar as the district court had authorized "generalized ex parte proceedings by the Court and/or the Special Master." (App. at 158-159.) The district court issued an order on 15 July 2003, clarifying its Minutes of the 17 June 2003 status conference and denying Defendants request for transcripts. (App. at 40-43.) The district court's order further provided that, "[o]nce the special master concludes his investigation and files a complete report, the Court will afford the parties the opportunity to file objections to the Special Master's report and hold an evidentiary hearing if warranted." (*Id.* at 43.)

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[5] These documents were not included in the Appendix to the Petition for Certiorari, although Defendants' response to them was. (App. at 160-166.)

On 17 October 2003, the Special Master filed his "Second Report." (App. at 88-124.)[6] On 3 November 2003, Defendants filed a "Motion Submitting Objections to Second Report of the Special Master." (App. at 167-179.) With respect to the contents of the report, Defendants objected that the budget for the Hospital and the San Patricio Center was within the court established requirements. The emphasis of the motion, however, was on the argument that counsel for Defendants was not being kept abreast of the Special Master's investigatory efforts and was not being allowed to participate in interviews and the furnishing of documents, thus, Defendants argued, rendering the Special Master's investigation unconstitutional on due process grounds. Moreover, it was alleged, the Special Master was "participat[ing] in executive functions" and attempting to "co-administer the Hospital" by creating a Master Group to meet with the Department of Health Task Force which was overseeing the Hospital.[7] Soon

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[6] Again, the Appendix to the Petition of Certiorari includes a copy of this report but omits approximately three hundred pages of exhibits submitted with the report.

[7] Petitioners "note," (*see* Pet. for Cert. at 15 and 22), but do not present for review, (*see* Pet. for Cert. at i), their claim that the Special Master has exceeded his mandate by creating a "Special Master's Group" to meet with Department of Health officials in order to assist them in addressing problems currently faced by the Hospital. This *proposal* was initially made by the Special Master and ultimately countenanced by the Secretary of Health, one of the Petitioners in the case. It should be noted that the order of reference in this case specifically authorizes the Special Master to, "make informal suggestions to the defendants in whatever form he deems appropriate, which in his opinion will facilitate compliance with the decree." Counsel for Petitioners makes exaggerated claims to the effect that Petitioners were coerced into this arrangement and that the meetings constitute "undu[e] influence" of and "participat[ion]" in the administration of the Hospital and "Commonwealth public

(Continued on following page)

thereafter, the Special Master filed a Motion for sanctions against counsel for the Defendants arguing that he should be punished for his tenacious obstruction of the Special Master's investigation and for making inflammatory accusations against the Special Master. (App. 180-221.) This motion was denied by the district court on 9 December 2003. (App. at 44-45.)

The Special Master's Third Report was filed on 20 January 2004. (District Court Docket No. 546.) On 30 January 2004, the district court extended the term of the Special Master to 1 May 2004.

C. Proceedings before the First Circuit Court of Appeals:

On 1 July 2003, pursuant to Defendants' Notices of Appeal[8] of 22 May 2003, 18 June 2003 and 25 June 2003,

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policy." Conspicuously lacking, with respect to this claim, are any specific examples of such undue influence or evidence of any conflict arising from suggestions or proposals made by the Special Master or the "Special Master's Group." The question of the propriety of these meetings is, conveniently, not presented for review, but rather casually dropped into Petitioners' argument in an effort to cast a dark cloud over the Special Master's enterprise. Thus, these ill-willed accusations should be totally ignored by this Court.

[8] Defendants' practice of filing several purported amendments to the notices of appeal created some disorder in the docketing functions of the First Circuit Court of Appeals. The notice of appeal of 22 May 2003, was docketed as Appeal No. 03-1884. Defendants 19 June 2003 "Amended Notice of Appeal," was docketed in the circuit court as Appeal No. 03-1998. The 25 June 2003 "Second Notice of Appeal," was docketed as part of Appeal No. 03-1998. Defendants' Petition for Writ of Mandamus was further docketed as No. 03-1946. Appeal No. 03-1884 was consolidated with the mandamus petition No. 03-1946, but, consolidation was not

(Continued on following page)

Defendants filed a "Motion for Stay of the District Court Orders Authorizing Ex-Parte Investigation by Special Master and Requesting Expedited Appeal," before the Circuit Court of Appeals for the First Circuit. On 2 July 2003, the Circuit Court of Appeals issued an order noting their apparent lack of jurisdiction over the orders appealed from and directing the Defendants to voluntarily dismiss the appeal or to show cause why the appeal should not be dismissed for lack of jurisdiction. On 8 July 2003, Defendants responded by referring the court of appeals to its "Petition for Writ of Mandamus and Appellant's Brief on the Merits," which had been filed on 3 July 2003[9] arguing that jurisdiction was predicated on the Court's supervisory mandamus power and pursuant to collateral order exception under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Defendants also filed an "Emergency Motion for Stay of Special Master's Co-Administration of Psychiatric Hospital Pe[n]ding Review of Motion for Stay," a motion which was denied by the circuit court on the same day it was filed.

On 15 July 2003, Plaintiff Class filed its "Opposition to Defendants' Motion to Stay the Special Master's Investigation," arguing that Defendants had not met their burden to show that they were entitled to such a stay because, among others, they were unlikely to succeed on the merits because the Special Master's investigation was in accordance with the Special Master's order of reference,

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requested with respect to the third case, Appeal No. 03-1998, which remained separate.

[9] This document was later replaced by an amended version on 18 July 2003.

an order which had not been challenged, and because the requirements for interlocutory and mandamus jurisdiction were not met in this case. On 21 July 2003, the Court of Appeals for the First Circuit issued a judgment in which it dismissed the appeal before it for lack of jurisdiction and denied the petition for a writ of mandamus.[10] With respect to this appeal, Defendants' request for rehearing en banc was denied on 5 September 2003.

The Court then issued an order noting its apparent lack of jurisdiction over Defendants' other appeal[11] for the same reasons expressed in its 21 July 2003 order, and directed the Defendants to voluntarily dismiss the appeal or to show cause why the appeal should not be dismissed for lack of jurisdiction. Defendant responded by arguing that the appeal presented a new issue not encompassed in appellants' earlier appeal, an argument which was opposed by Plaintiffs. On 4 November 2003, the court of appeals, finding that no new issue was in fact presented, dismissed Appeal No. 03-1998 for the same reasons the earlier appeals had been dismissed.

Despite the alleged risk of irreparable harm to their interests, Defendants (hereinafter "Petitioners") did not file their Petition for Certiorari within the ninety-day period provided in this Court's Rules and, rather, requested additional time to file their petition which was eventually presented on 23 December 2003.

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[10] This order pertained to Appeal No. 03-1884 and the mandamus petition Case No. 03-1946. *See supra* note 8.

[11] Referring to Appeal No. 1998. *See supra* note 8.

REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED

In this case, Petitioners seek to challenge the activities of a Special Master during his investigation which included ex parte (meaning outside the presence of counsel) interviews and document exchanges between the Special Master and the Petitioners and their employees. At times throughout this process, Petitioners have expressed their concern with the process which will follow the Special Master's presentation of the results of his investigation. Of course, these harms are entirely speculative since the Court has not yet decided what it will do with the recently filed Special Master's Final Report. For the purpose of seeking interlocutory review, however, Petitioners argue that the very act of permitting these ex parte interviews and document exchanges, constituted a due process violation or was otherwise legally improper because it creates a danger that privileged information may be divulged outside the presence of counsel. This is the only coherent theory of harm described and argued by Petitioners. As detailed more fully below, the Petition for Certiorari should not be granted because a number of factors militate against the exercise of certiorari jurisdiction, and because the results reached below were correct.

I. Even Assuming That the Present Controversy Were Not Moot, this Court Should Not Consider the Question Presented Pertaining to the Propriety of the Special Master's Investigation since the Issue was Not Properly Preserved, Sufficiently Developed or Decided Below.

This Court does not generally address issues not decided or fully considered by the courts below. *See e.g.*,

Roberts v. Galen of Va., Inc., 525 U.S. 249, 253-254 (1999). While there can be no doubt that counsel for the Petitioners raised, *ad nauseum*, generalized claims that the Special Master's ex parte investigation violates notions of due process, the somewhat more recent theory that the legal impropriety of that investigation stems from the possibility that this process might endanger the confidentiality of privileged information was not litigated before the district court prior to presentation of the appeal(s) and the petition for mandamus.[12] It is important to point out that this particular argument (the potential threat to privileged information) was not developed below because the entire Petition for Certiorari now hinges on it. It is not only that Petitioners' first question presented is inextricably intertwined and completely dependent upon the idea that the ex parte communications have the potential to compromise privileged information, for otherwise, Petitioners have identified no immediate or legally cognizable harm stemming from such communications. It is also that Petitioners' argument that mandamus should have issued from the appellate court rests upon cases in other circuit court of appeals where mandamus issued because otherwise a privilege would be divulged and there would be no adequate remedy. (*See* Pet. for Cert. at 27.)

[12] The first mention of the issue is made in the Petition for Mandamus and Appellant's Brief on the Merits, dated 1 July 2003, presented to the First Circuit Court of Appeals. The first mention of the issue in the district court is in Petitioners' Motion Submitting Objections to Second Report of the Special Master, dated 3 November 2003. (App. at 167-179.) No ruling has been made by the district Court on that motion.

The argument relating to privileges was first mentioned to the district court as part of Petitioners' objections to one of the reports of the Special Master (on 3 November 2003). In that document, Petitioners made no attendant request for relief (other than to request that the master's recommendations not be adopted in the absence of a hearing), and the argument was neither responded to nor ruled upon. Moreover, the argument was never reached by the Court of Appeals at all since the case was dismissed for want of jurisdiction. The argument should, therefore, not be entertained by the Court.

II. The Court Should Not Exercise its Discretion to Grant Certiorari in the Present Case Because the Court of Appeals' Decision Is Not in Conflict with the Law of Other Circuits and the Allegedly Conflicting Decisions Noted by Petitioners Are Distinguishable on the Law and Facts.

Petitioners claim that the appellate court's refusal to exercise interlocutory or mandamus jurisdiction is in conflict with the law of other circuits. (Pet. for Cert. at 27.) The cases cited by in the Petition for Certiorari are distinguishable from the present case both on the law and on the facts.

The argument that the Special Master's investigation itself endangers the secrecy or privacy interests of Petitioners is purely speculative. In the present case, there has not even been the remotest suggestion on the part of Petitioners that upon being interviewed by the Special Master, a concerned Defendant made the request to consult with counsel prior to divulging information, but was threatened or otherwise coerced into giving up the

information. Rather, Petitioners' argument hypothesizes that if at some point in his investigation the Special Master requests information which was privileged, the interviewee or person compiling documents, either through error or inadvertence (since counsel was not present[13]), might respond by divulging privileged information. Fortuitous disclosures such as the one described could just as easily result from answering questions at a press conference, granting a television interview or discussing work with interested persons at a dinner party and, frankly, such innocuous waivers of technically privileged, but not terribly important information occur all the time with little or no attendant consequences.

This situation is readily distinguishable from the cases cited by Petitioners in their Petition for Certiorari. (*See* Pet. for Cert. at 27.) None of the cases cited by Petitioners concern situations in which the mere *possibility* that privileged information *might* be requested, and then *perhaps* revealed, warranted the granting of mandamus relief. Rather, in the cited cases mandamus is entertained to address distinct district court orders directing the disclosure of particular information, communications or documents claimed to be protected by specific and identified privileges where the district court had evaluated and rejected the claims of privilege for various and sundry reasons. *In re Von Bulow*, 828 F.2d 94 (2nd Cir. 1987) (mandamus issued to review an order granting plaintiff the right to discover the contents of certain conversations

[13] The fact that Defendant can meet with counsel prior to and after the interview with the Special Master is apparently not something that has occurred to opposing counsel.

between petitioner-defendant and his attorneys); *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987) (mandamus issued to review an order compelling production of specific documents allegedly protected by attorney client privilege and work product privilege) *cert. denied*, 484 U.S. 1007 (1988); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486 (9th Cir. 1989) (mandamus issued to review an order compelling production of statements by two senior company officials gathered by counsel in anticipation of litigation); *Barclays American Corp. v. Kane*, 746 F.2d 653 (10th Cir. 1984) (mandamus *denied* to review district court's order compelling production of some of the documents identified in a privilege log which were found not to be privileged)[14]; *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970) (mandamus issued to reverse district court order to compel production of counsel's debriefing memoranda of particular employees since they were protected by work product privilege).

In those cases the revelation of allegedly protected information is certain, specific, palpable and imminent, thus supporting the allegation of a need for prompt and extraordinary relief, whereas in the present case the revelation of protected information is abstract and improbable. The purported "conflict in authority," is therefore nonexistent.

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[14] It should be noted that the Petition for Certiorari falsely asserts that this case supports the proposition that mandamus should have been issued.

III. The Court Should Not Exercise its Discretion to Grant Certiorari in the Present Case Because the Issues Presented by the Petitioner Are Not Compelling or Important Enough to Warrant Review.

As already discussed, Petitioners argue that the very act of permitting interviews and document exchanges outside the presence of counsel between the Special Master and the Petitioners and their employees, in and of itself, constitutes a due process violation because of the threat that privileged information may be divulged. Nevertheless, throughout this process this supposed threat has remained purely theoretical. No claim has ever been made that the Special Master actually sought to acquire privileged information, nor are there any specific, concrete examples of privileged information being requested or handed over to the Special Master. Moreover, as indicated below in part V of this document, ex parte communications between the special masters and parties are permitted in some circumstances and were appropriate in this case. Assuming good faith, rather than any intentional attempt to conceal, it appears that opposing counsels' primary concern is their own inability to monitor, respond to and control the Special Master's investigation.

Petitioners do not paint a picture of a district court so wildly out of control as to require this Court's censure or rectification. To the contrary, there are no federal rules, no statutory provisions and few judicial standards that address situations such as those confronted by the district court. Given what the district court perceived as a very real potential for further deterioration of conditions at the Hospital and the resultant harm to the Plaintiff Class, and clearly moved by a sense of duty based on its twenty-eight

year involvement with the Hospital, the lower court developed an expeditious and artful strategy for addressing the problems it perceived, as a better alternative to mobilizing its contempt powers or other more traditional approaches[15] which would not likely have been as efficacious and responsive to the needs immediately at hand.

Nor is it probable that the resolution of the questions presented here would be capable of providing guidance to any wide class of litigants in other cases. The special and particular circumstances surrounding the appointment of the Special Master in this case, coming as it does after the finalization of twenty-eight years of institutional reform litigation at a time of sudden and unexpected institutional crisis, make the legal issues raised by Petitioners rather unique.

IV. The Decision below Was Correct Because the Circuit Court of Appeals Did Not Have Interlocutory Jurisdiction over the Issues Raised on Appeal and Did Not Abuse its Discretion in Declining to Review Those Issues Pursuant to its Mandamus Power.

Generally speaking, district court orders or decisions appointing or giving procedural direction to a special master are non-appealable. *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *see also Morales Feliciano v. Rullan*, 303 F.3d 1, 10 (1st Cir. 2002). Nonetheless,

[15] The Court could have, for example, directed Plaintiffs to conduct discovery and file a motion for contempt, a litigation process which would doubtless have been more sluggish in addressing the problems existing at the Hospital.

Petitioners predicate jurisdiction in their case before the Court of Appeals upon the collateral order doctrine and the appellate court's power to issue a writ of mandamus.

The collateral order doctrine was first described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949):

> Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.
>
> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. . . .
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.

Id. at 545-6. One of the most common examples of the application of the *Cohen* doctrine occurs where official immunity is denied based purely on a question of law, giving place to interlocutory review because appeal after

trial cannot effectively protect against the burdens of trial. *E.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

It should be remembered that the collateral order doctrine is an extremely narrow exception. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985). To meet the *Cohen* exception an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). It is important to recall that, even where the order conclusively determines the disputed question and resolves an issue separate from the merits, the claim of harm, if insufficiently serious, will not trigger the collateral order doctrine. In this sense, the issue must be "important" and work some real and irreparable hardship upon the party claiming appellate jurisdiction, such that the issue is rendered "unreviewable," if not immediately heard. *Id.*; *see also Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (The doctrine allows appeal "from orders other than final judgments when they have a final and irreparable effect on the rights of the parties."). Thus, it is important to keep in mind that application of the collateral order doctrine has been denied even where a failure to review may lead to some prejudice. For example, in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), this Court held that a district court order denying class certification did not give rise to a right to appeal under the collateral order doctrine. Likewise, in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court ruled that the collateral order exception did not apply to a district court's denial of a motion to disqualify an attorney

for conflict of interests, because effective review could be had on appeal from the final judgment.

In the present case, these requirements for application of the collateral order doctrine are not fulfilled. The district court has not conclusively determined the disputed question because it has not yet determined what use, if any, will be given to the Special Master's reports. And although the Special Master's charge, in general terms, is separable from the merits of the action, the question of how his investigation is conducted is not separable from his commission in general and the manner in which his reports are ultimately used by the district court, a process which has yet to be completed.

Finally, there is no reason to credit the assertion that, if not addressed at this time, review will be impossible. If the district court acts upon the Special Master's report to issue a final judgment which prejudices Petitioners, they would, at that time, be able to challenge that action by raising their objections to the manner in which the Special Master's investigation was carried out.

Moreover, in this case, to the extent that the order sought to be reviewed is so closely tied to the particular circumstances of this specific scenario, it would be inappropriate to apply the collateral order exception here. *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 206 (1999) ("[W]e have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral."); *see also U.S. v. Quintana Aguayo*, 235 F.3d 682, 685 (1st Cir. 2000) ("Appealability must be decided for classes of orders, ignoring injustices peculiar to the case at hand").

Unlike the cases in which specific and particularized information is ordered to be divulged over claims of

privilege or secrecy, *e.g.*, *Irons v. Federal Bureau of Investigation*, 811 F.2d 681, 683 (1st Cir. 1987) (reviewing an order to produce documents identifying informants because denial of appeal "would be to force the government to let the cat out of the bag, without any effective way of recapturing it if the District Court's directive was ultimately found to be erroneous."), the privilege argument here is purely speculative if not completely trumped up as a justification for appellate review. As mentioned above, there are no concrete examples of privileged or otherwise protected information being compromised and Petitioners' argument that the absence of counsel during the Special Master's interviews and compiling of documents *may* cause protected information to be revealed is both speculative and highly unlikely. It would be histrionic, therefore, to consider that the potential harm to Petitioners is so great as to require the extraordinary measure of interlocutory review.

For these same reasons, exercise of mandamus jurisdiction by the First Circuit Court of Appeals would not have been proper in this case. It is most important to remember that issuance of the writ of mandamus is in large part a matter of discretion with the court to which the petition is addressed. *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n. 8 (1964). Supervisory control of the district courts through mandamus is appropriate when there has been a "clear abuse of discretion," a "usurpation of judicial power," or an "abdication of the judicial function." *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957).

Mandamus is an extraordinary and "drastic" remedy, *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976), that is justified only by "exceptional circumstances

amounting to a judicial 'usurpation of power,'" *Will v. United States*, 389 U.S. 90, 95 (1967). A consideration of the factors which would normally weigh in favor of an exercise of mandamus jurisdiction demonstrates that the appellate court's decision to deny the petition for mandamus was well within its discretion. *Bauman v. United States District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977) ("(1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. . . . (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) . . . (3) The district court's order is clearly erroneous as a matter of law. . . . (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. . . . (5) The district court's order raises new and important problems, or issues of law of first impression.").

In fact, in one of the cases cited by Petitioners, the Seventh Circuit Court of Appeals denied the petition for mandamus explaining that, even acknowledging the potential irreparable harm that might come from the disclosure of information alleged to be protected by privilege, mandamus jurisdiction was not proper. *Barclays American Corp. v. Kane*, 746 F.2d 653, 654-6 (10th Cir. 1984). Petitioners also cite a number of cases in which mandamus issued to review orders requiring disclosure of particular information alleged to be privileged. As discussed above, those cases are distinguishable from the case at hand. A much more apposite case is *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394 (1976). In that case, the plaintiffs requested discovery of documents alleged by the defendants to be confidential based on common law governmental privileges. In ruling on the

plaintiffs' motion to compel, the district court ordered disclosure and the defendants sought a writ of mandamus which was rejected by the appellate court. On certiorari, this Court rejected the use of mandamus in the face of general and non-particularized claims of privilege. *Id.*

Petitioners claim that they will suffer irreparable harm if the Special Master's investigation is not stopped. With respect to the claims that the Special Master's investigation potentially threatens the confidentiality of privileged information, Petitioners' argument is a ghost, which is neither an inescapable nor a logical consequence of the type of investigation being carried out, and which is wholly unsubstantiated by the facts. Moreover, at this time the Special Master's reports have not been acted upon by the district court, and unless and until that occurs, it is tomfoolery to claim any harm. The district court has not stated that it plans to issue injunctive relief, award damages or rule Petitioners in contempt, much less based only on the Special Master's investigation without any further proceedings or hearings on the matter. In fact, the Court has specifically indicated that "[o]nce the special master concludes his investigation and files a complete report, the Court will afford the parties the opportunity to file objections to the Special Master's report and hold an evidentiary hearing if warranted." The appellate court was, therefore, correct to dismiss the appeal and deny the petition for mandamus.

V. Even Assuming That this Court Had Jurisdiction and Chose to Address this Case on the Merits, the Result below Would Still Be Correct Because a Special Master Has Discretion to Conduct Informal Investigations So Long as the Parties Are Given an Opportunity to Object to the Results of His Investigation and Allowed to Present Evidence in Support of Their Position.

Petitioners argue that the participation of counsel at the Special Master's interviews[16] and requests for production of documents is legally required because these interviews may have touched upon privileged matters and, without counsel's presence, there is no way of avoiding the privileged information from being divulged or knowing whether or what kind of privileged information has in fact been gathered by the Special Master. Why counsel for Petitioners has such poor communication with his clients that he was unable to advise them with respect to their potential privileges or debrief them with respect to what information was transmitted to the Special Master is not discussed.[17]

It should be remembered that the order reappointing the Special Master in this case was in response to certain

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[16] It is also important to note that the Special Master has conducted interviews of persons who are not defendants in the case with respect to whom Petitioners cannot make arguments of protecting privileged information.

[17] A potentially troubling suggestion made by the Special Master is that the Secretary of Health has been significantly more disposed to cooperating with the Special Master than the documents presented by his legal representative suggest. Plaintiffs, however, cannot claim to know any more than what is contained in the documents filed by the Special Master.

public and private information drawn to the attention of the district court, suggesting that its orders were not being complied with. District Courts have a continuing duty to ensure that their orders are respected. This is especially so in a case such as this concerning constitutional rights and institutional reform, where the protracted (approximately 28 years of litigation from 1974 until 2002) and exhausting work that has been accomplished suddenly seems to be at the point of unraveling.[18] Under such circumstances, a district court can and should have authority to carry out an investigation, including ex parte communications between a special master and the parties, if it believes that such are necessary and desirable in ensuring the preservation of progress made in ensuring adherence to constitutional standards. It should be noted that the Special Master's investigation has not involved the use of his subpoena power nor have any of the persons interviewed been placed under oath. Rather, in accordance with the practice that has generally been utilized in this case, the proceedings have been informal and flexible.

Although Petitioners make much ado of the limitations allegedly imposed upon the work of Special Masters, recent amendments to Rule 53 make plain that ex parte communications between special masters and parties may be legitimately carried out as part of a special master's

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[18] All those involved in this case know only too well how difficult it is to attempt to correct institutional problems once an institution is in a state of crisis. It is hoped that the rapid assistance of the district court through the Special Master's quick intervention may help address the Hospital's problems before they spiral out of control.

enterprise. See Fed. R. Civ. P. 53(b)(2)(B).[19] Given that such communications are contemplated in the figure of the Special Master, and the district court's perception of the need to take swift and effective action in the case, the district court did not abuse its discretion in authorizing the type of investigation of which Petitioners complain. Thus, even assuming that this court chose to address this case on the merits, the result below would still be correct.

CONCLUSION

For the forgoing reasons, respondent asks that the Court deny the Petition for Certiorari.

Dated: San Juan, Puerto Rico, 2nd of February 2004.

Respectfully submitted,

CARLOS V. GARCÍA GUTIÉRREZ
ALEJANDRA BIRD LÓPEZ

[19] It should be noted that this portion of the rule, which provides that the order appointing the special master must state, "the circumstances . . . in which the master may communicate ex parte with the court or a party," was not in effect until after the order appointing the Special Master in this case was issued.